IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/12/2003

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THE HONOURABLE MR.JUSTICE R.JAYASIMHA BABU
and
THE HONOURABLE MR.JUSTICE S.R.SINGHARAVELU

T.C.No.115 of 2000

The Commissioner of Income-tax,
Tamil Nadu-IV, Chennai. ... Applicant.

-Vs-

M/s.Henkel SPIC India Ltd.,
Chennai. ... Respondent.

Tax case reference arising out of the order of Income-tax
Appellate Tribunal, Madras Bench-A, in ITA.No.2395/Mds/1996 dated 21.1.1997,
at the instance of the Revenue.

!For applicant : Mrs.Pushya Sitharaman,
Sr.Standing counsel for IT.

^For respondent : Mr.V.Ramachandran, Sr.counsel for
M/s.Anitha Sumanth
:JUDGMENT

(Delivered by R.JAYASIMHA BABU,J.)
Question referred to us is 'whether the Tribunal was right in
law in holding that the interest earned on short-term deposits of share
application money by the assessee did not accrue to the assessee during the
assessment year 1992-93'.

2. The assessee is a Public Limited Company which came out
with a public issue of shares on 29.1.1992 and the issue was closed on 3.2.1
992. The application money received by the company was deposited with
collecting banks or the bankers of the company, to which the amounts were
transferred, for 46 days. The interest earned on such deposits was sought to
be taxed by the Assessing Officer as income for the assessment year 1992-93.
The assessee's contention was that the application money which had been
received from the applicants for the allotment of shares was required to be
and was kept in a separate bank account as required by section 73(3) of the
Companies Act and that the interest earned on those moneys could not have been
treated as income accrued to the company even before the allotment process was
completed. The allotment process was completed only in the following

assessment year after receipt of approval for listing the company's shares in Madras, Delhi, Ahmedabad and Bombay Stock Exchanges such approvals having been received on 27.4.1992, 8.5.1992, 21.5.1992 and 6.7.1992 respectively.

3. The Assessing Officer, though he had some doubt as to when the interest was credited to the account whether before or after 31.3.1992 , counted the period of 46 days from the date of deposit and on that basis, held that the amount of interest accrued for the period prior to 31.3.1992 was liable to be taxed under the head, 'Income from other sources' as the assessee had not commenced business in that year.

4. On appeal, the Commissioner of Income-tax (Appeals) concurred with the view of the assessing officer and held that the interest that had accrued on the application money which had been kept in shortterm deposits belonged to the assessee and was liable to be taxed in the hands of the assessee on the basis of accrual.

5. The Tribunal, on further appeal by the assessee,upheld the assessee's view and set aside the orders of the Commissioner as also the Assessing Officer.

6. Section 73 of the Companies Act,1956 deals with allotment of shares and debentures to be dealt with on stock exchange. Subsection (1) thereof provides that every company, intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange. Sub-section (2) thereof provides that where the permission has not been applied under sub-section (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus and if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay the money with interest at such rate not less than four per cent and not more than fifteen per cent as may be prescribed having regard to the length of the period of delay in making the repayment of such money. Rule 4-D of the Companies (Central Government's) General Rules & Forms, 1956 prescribes 15 per cent as rate of interest.

7. Sub-section (2A) of section 73 provides for the refund of application money received in excess of the value of shares allotted in a similar period of eight days, failing which the company shall pay interest at such rate not being less than 4% and not exceeding 15% as prescribed by Rules.

8. Sub-section (3) of section 73 reads thus:-
"All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has been granted or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such

separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section (2), and if default is made in complying with this sub-section, the company and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees".

9. Sub-section (3A) of section 73 states, "Moneys standing to the credit of the separate bank account referred to in sub-section (3) shall not be utilised for any purpose other than the following purposes, (a) adjustment against allotment of shares where the shares have been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus; or (b) repayment of moneys received from applicants in pursuance of prospectus, where shares have not been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus, as the case may be, or, where the company is for any other reason unable to make the allotment of share".

10. Sub-section (4) of section 73 provides that any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirements of section 73 shall be void.

11. Thus, in all cases where a company offers to issue shares or debentures to the public for subscription by the issue of prospectus, before making such an issue, the company is required to make an application to one or more recognised stock exchanges for permission for dealing with its shares on such stock exchanges. Until such permission is granted by the stock exchange or stock exchanges, the company shall not use the application moneys and such moneys shall be kept in separate bank account in a Scheduled Bank. Moneys so kept shall only be utilised for adjustment against allotment of shares after the stock exchange specified in the prospectus permits the company to deal with its shares on that stock exchange. In cases where the company has failed to apply for permission, or such permission having been applied for has not been granted by the Stock Exchange, as also in cases where the company is, for any other reason, unable to make allotment of shares, the company shall repay to the applicants the moneys paid by them from and out of bank account in which such moneys had been kept.

12. The application money becomes refundable not only under the circumstances referred to in sub-section (2), but also for other reasons which have been referred to in an omnibus manner in section 73(3 A)(b) as 'any other reason for which the company is unable to make allotment of shares'.

13. In cases where the company has not applied at all for the listing of shares on the Stock Exchanges, but has issued prospectus and collected application money, the company would be liable to repay the application money immediately after receipt of the same, as application for listing is required to be made under section 73(1) before the issue of prospectus. In cases where such permission has been applied for, but is not granted within the time prescribed in sub-section (1 A) of section 73 being a period of 10 weeks from the date of closing of the subscription lists, the company would become liable to repay the application money to the applicants.

If such repayment is not made within eight days after the company has become liable to repay the application money, it is required to pay interest at the prescribed rate.

14. In cases where the failure to allot shares is for reasons other than those already referred to, then also the company would become liable for repayment of money.

15. The grace period of eight days given to the company under section 73(2) for effecting repayment without interest will not apply to cases where liability is incurred for a reason other than those specified in sub-section (2). Applicants in such cases would be entitled to claim interest for the entire period during which the application moneys were wrongfully held by the company. In cases covered by section 73(2), for any delay beyond the first eight days after liability for repayment has been incurred, the company is liable to pay interest at the prescribed rate which under the Rule 4D is 15 per cent.

16. Thus, a company which receives application money will be liable to repay the money to the applicants in all cases where shares are not allotted. If the non-allotment is for the reasons referred to in sub-section (2) or (2A) or (3), the company will have the grace period of eight days for repayment without interest. Those days is computed from the date on which the liability for repayment is incurred. In cases where the liability is incurred for any other reason, there is no grace period available to the company. Application money has to be kept in a separate bank account and that money is not available to the company for being used by it for it's own purposes in any manner. That application money is only held by the company as a trustee for the benefit of those who had paid those sums. It is permissible for the company to adjust the application money against the shares actually allotted and refund the balance to those who had applied for and to whom shares are not allotted.

17. The company is not, under section 73, required to keep the money in a bank account which yields interest. There is, however, no prohibition in sub-section (3) or (3A) of section 73 against the money being kept in a bank account which yields interest. The interest so earned, however, cannot be regarded as an amount which is fully available to the company for its own use from the time the interest accrued, as that interest is an amount which accrues on a fund which itself is held in trust until the allotment is completed and moneys are returned to those to whom shares are not allotted. No part of this fund, either principal or interest accrued thereon, can be utilised by the company until the allotment process is completed and money repayable to those entitled to repayment has been repaid in full together with such interest as may be prescribed having regard to the length of period of delay in the return of money to them.

18. It is only after the allotment process is completed and all moneys payable to those to whom moneys are refundable are refunded together with interest wherever interest becomes payable, the balance remaining from and out of the interest earned on the application money can be

regarded as belonging to the company. The application money as also interest earned thereon will remain within a trust in favour of the general body of applicants until the process outlined above is completed in all respects. The prohibition contained in sub-section (3 A) of section 73 against the moneys standing to credit in a separate bank account being utilised for purposes other than those mentioned in that sub-section, is absolute and the interest earned on the amounts in such separate bank account will remain a part of that separate bank account and cannot be transferred to any other account.

19. As the amount of interest earned on the application money to the extent to which it is not required for being paid to the applicants to whom moneys have become refundable by reason of delay in making the refund will belong to the company, only when the trust terminates and it is only at that point of time, it can be stated that that amount has accrued to the company as its income.

20. The Tribunal was, therefore, right in taking the view as it did that the allotment process in this case was not completed in the assessment year 1992-93, but was completed only in the subsequent assessment year. It is only after that allotment process was completed in all respects, interest that had accrued on the application money kept in a separate bank account was capable of being regarded as belonging to the assessee.

21. The question referred to us is, therefore, answered in favour of the assessee and against the Revenue.

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To

1. The Assistant Registrar,
Income-tax Appellate Tribunal,
Rajaji Bhavan, Besant Nagar,
Chennai 600 090 (five copies with records)

2. The Secretary,
Central Board of Direct Taxes, New Delhi (3 copies)

3. The Commissioner of Income-tax,
Tamil Nadu IV, Chennai.

4. The Commissioner of Income-tax (Appeals IV),
Chennai.

5. The Deputy Commissioner of Income-tax,